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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE LEROY HURTADO,

Defendant and Appellant.

G033339

(Super. Ct. No. 03NF2504)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Daniel Rogers, Deputy Attorney General, for Plaintiff and Respondent.

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A detective observed a shotgun in defendant's bedroom closet. The gun was gone when the detective returned with a search warrant, but bullets were found in his dresser drawer. We conclude this evidence is sufficient to support defendant's convictions for possession of a firearm by a felon and possession of ammunition by a felon.

The trial court considered defendant's lengthy criminal history when asked to strike his 1996 felony conviction during the sentencing hearing. The trial court did not abuse its discretion when it declined to strike it.

We affirm.

I

FACTS

On July 21, 2003, Buena Park Detective Greg Pelton went to a home at 602 North Zeyn in Anaheim where defendant lived to serve him with an arrest warrant. The person who answered the door, Stanley Nickens, invited him into the house and pointed out defendant's room. Nickens told Pelton that "no one else's other than Jose Hurtado's belongings would be in that room."

Pelton directed two other officers to go into defendant's room to see if he was there. A few moments later, one of the other officers asked Pelton to step into defendant's bedroom. The closet door was open. Pelton observed a black Benelli Nova pump-action shotgun laying up against the west wall of the closet. Pelton picked it up to make sure the magazine row was empty. The shotgun appeared to be in working order. Nickens told Pelton he never saw the gun before and did not know it was in the house.

Pelton placed the shotgun back in the closet. When asked why he did this, he said, "Well, I messed up. I should have taken it with me." He explained he had forgotten defendant was a felon and was not allowed to have a shotgun in his home.

Buena Park Police Department never served defendant with the arrest warrant, but Anaheim Police Department arrested him on the warrant. After the arrest, Pelton obtained a search warrant because he had seen the gun in defendant's home. When Pelton searched defendant's home, he could not find the shotgun, but he found bullets in the drawer of the dresser in defendant's bedroom. Also in the drawer was a bandanna "with more unspent rounds in it."

A jury found defendant guilty of the crimes of possession of a firearm by a felon in violation of Penal Code section 12021, subdivision (a)(1) and possession of ammunition with a prior felony conviction in violation of Penal Code section 12316, subdivision (b). (All further statutory references are to the Penal Code.) After the jury was excused, the court found defendant suffered a prior felony conviction on April 12, 1996.

At the sentencing hearing, defendant's attorney asked the court to strike the prior conviction. The court declined to do so, explaining its ruling as follows: "As to the issue of the recidivist statute, the court does not believe that it would be an appropriate exercise of the court's discretion to strike the prior in this case. And that is after consideration of the defendant's lengthy history that's put forth on pages 8 through 10 of the Probation Report. [¶] And it documents that the defendant was involved in the juvenile system in relation to charges of theft, charges involving involvement in sales of controlled substances. As an adult, he has had multiple issues with being in possession of handguns. And that is prior to the strike offense in March of '96."

Defendant was sentenced to four years in prison. The sentence consisted of two years for each count, doubled under section 667, subdivisions (d)(1) and (e)(1) because of the prior violent felony conviction, and ordered to run concurrently.

On appeal, defendant contends there was insufficient evidence to support his convictions. He also argues the court abused its discretion in failing to strike the prior conviction.

II

DISCUSSION

Sufficiency of the evidence

In addressing challenges to the sufficiency of the evidence, “the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — evidence that is reasonable, credible and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury’s duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant’s guilt beyond a reasonable doubt. [Citation.] “‘If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]’” [Citation.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

Here, a police detective testified a resident of the house where defendant lived directed him to defendant’s room and told him that only defendant’s belongings were in the room. The detective said he saw a shotgun in defendant’s closet. Additionally, bullets and unspent rounds were confiscated when the search warrant was exercised. This evidence is sufficient to support the jury’s verdicts.

Prior felony

Defendant argues the trial court abused its discretion in failing to strike his prior conviction. He says he “should have been deemed outside the spirit of the Three Strikes law.”

In determining whether or not to strike a prior conviction under section 1385, a trial judge takes into consideration a defendant’s background, the current offense and other pertinent considerations. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 531.) “[T]he court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

“We have previously concluded that a court’s decision to strike a qualifying prior conviction is discretionary. [Citation.] As such, a court’s decision *not* to strike a prior necessarily requires some exercise of discretion. Because these two decisions are flips sides of the same coin, we see no reasoned basis for applying a different standard of review to a court’s decision not to strike.” (*People v. Carmony* (2004) 33 Cal.4th 367, 375.)

Defendant was convicted of violation of section 288, subdivision (a) in 1996 after having sex with a 13 year old and was sentenced to three years in state prison. That conviction followed juvenile incidents as well as an adult drug diversion program in 1993, possession of a handgun in 1994, possession of a handgun and bullets in 1995 and sale of drugs to an undercover officer in 1995. The trial court considered defendant’s lengthy criminal history and declined to strike his 1996 conviction for sentencing under

the “Three Strikes” law. We cannot find the court abused its discretion under these circumstances.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.